

FEDERAL MARITIME COMMISSION

PETITION OF OLYMPUS
GROWTH FUND III, L.P. AND
OLYMPUS EXECUTIVE FUND,
L.P. FOR DECLARATORY
ORDER, RULEMAKING OR
OTHER RELIEF

Docket No. 08-07

Served: June 15, 2009

Order Denying Petition

I. PROCEEDING

This proceeding was instituted with the filing of a petition by Olympus Growth Fund III, L.P. and Olympus Executive Fund, L.P. (Petitioners), seeking to have the Commission issue a declaratory order, initiate a rulemaking, or grant other appropriate relief to confirm that an industry practice involving domestic inland movements is not a violation of section 10(a)(1) of the Shipping Act (the Act), 46 U.S.C. §§ 40101–44106 (2006).¹ Alternatively, Petitioners request that the Commission initiate a docketed proceeding for the purpose of granting Petitioners leave to intervene in a formal investigation of the shipment practices of Global Link Logistics Inc. (Global Link), a non-vessel-operating common carrier (NVOCC).

¹ Section 10(a)(1) of the Shipping Act has been recodified as section 41102(a). 46 U.S.C. § 41102(a). The parties refer primarily to section 10(a)(1), and their references will be used in this order.

In the Commission's Notice of Filing of Petition, it was requested that Global Link and the Commission's Bureau of Enforcement (BOE) reply to the petition. Subsequently, comments were invited from other interested parties with respect to the request in the petition to initiate a rulemaking proceeding. In response, ABS Consulting filed comments and Petitioners filed a Response to Replies and Comments. Subsequently, Global Link filed a Motion to Strike Petitioners' Response to Replies and Comments. Petitioners then filed a Motion to Accept Petitioners' Previously Filed Response to Replies and Comments, and Global Link filed a Reply to Petitioners' Motion, incorporating by reference their previously filed Motion to Strike. Finally, Petitioners filed a Reply to Motion to Strike, requesting that the Commission deny Global Link's Motion to Strike.

II. POSITIONS OF THE PARTIES

Petitioners state that their petition arises out of the sale of their ownership stake in Global Link and a subsequent attempt by the purchasers and their successors, including Global Link, to now undo the transaction through arbitration. According to Petitioners, the purchasers' claims in the arbitration are based, in part, on their assertion that Global Link's practice of re-routing the domestic inland transportation leg of a through shipment violates the proscription in section 10(a)(1) of the Shipping Act against obtaining ocean transportation at less than the rates or charges that would otherwise be applicable.

Petitioners assert that the Commission has never brought an enforcement action against a shipper for re-routing the domestic inland portion of a through shipment, and that Global Link has sought to establish the precedent that it needs to prevail in the commercial arbitration by voluntarily disclosing the practice to BOE. According to Petitioners, Global Link hopes to use the informal disclosure proceeding to obtain from BOE an "expert opinion" for use in the arbitration. Petitioners state that the

Commission must clarify its views as to the proper scope of section 10(a)(1) of the Act, and they assert that the use of an informal proceeding between Global Link and BOE to declare a practice unlawful raises serious questions when the illegality of the practice is not clear from the language of the statute or regulations.

Petitioners assert that BOE appears poised to find that the practice of re-routing the domestic inland portion of through transportation violates section 10(a)(1) of the Act, despite what Petitioners contend is plain language of the statute to the contrary. Petitioners argue that fundamental notions of fairness and administrative due process require that the Commission provide an opportunity for notice and comment on what they describe as a significant change in the administration and application of the Shipping Act. Alternatively, Petitioners argue that Global Link's voluntary disclosure to BOE should be the subject of a formal docketed proceeding with notice, opportunity for hearing, and opportunity to intervene. Petitioners assert that their "intervention rights" should not be bypassed through the use of informal proceedings by BOE. Petitioners state that they have a significant interest in the proceeding because the challenged conduct occurred while Petitioners owned Global Link, and Global Link's intent to use the voluntary disclosure proceeding in the commercial arbitration demonstrates that the proceeding will have a material effect on Petitioners' interests.

In its reply, Global Link states that after purchasing the company in 2006, Golden Gate, L.L.C (Golden Gate) discovered that Global Link had engaged in a practice described as "split deliveries" for the majority of its shipments from overseas. According to Global Link, this practice involved booking shipments with ocean carriers to U.S. destinations with low service contract rates, and subsequently diverting such service contract shipments to alternative destinations without the ocean carriers' knowledge. Global Link states that former employees of the company would instruct the company's partner in China to book shipments with ocean carriers to U.S. destination points with low service contract

rates. At the same time and for the same shipments, Global Link would instruct its Chinese partner to issue the NVOCC bill of lading identifying an alternate destination, which was where the cargo would actually be delivered to the customer. Thus, according to Global Link, two through bills of lading would be issued for each shipment: the ocean carrier's master bill of lading to the sham destination, and the NVOCC's house bill of lading to the actual destination requested by Global Link's customer.

When shipments arrived in the U.S. at the port or rail ramp where the containers would be transferred to motor carriers for final delivery, Global Link would issue two different delivery orders: one to be received by the ocean carrier solely as an information copy, and a second version to be actually implemented by the motor carrier. The delivery order given to the ocean carrier (under the title of "Shipline") would state that the shipment was to be delivered to the sham destination, while the delivery order given to the motor carrier (under the title of "Truckline") instructed that the shipment was to be delivered to the actual destination. According to Global Link, by previous arrangement between it and the motor carrier, the motor carrier understood that the Truckline delivery order was the one to be given effect.

Global Link states that after its new owners learned of the "split delivery" practice, they consulted legal counsel and subsequently determined that the practice was in violation of the Shipping Act and could not be continued. The new owners replaced Global Link's management team, stopped all split deliveries, and severed ties with Global Link's partner in China. They also instituted an arbitration seeking damages from the former owners, including Petitioners, for violation of a representation in the Stock Purchase Agreement that Global Link had been operated in compliance with applicable law. Global Link states that it subsequently disclosed the split delivery practice to BOE, and has been in discussions with BOE under the informal compromise procedures of Rule 604 of the Commission's Rules and Procedure. 46 C.F.R. § 502.604.

After setting out these background facts, Global Link makes five primary arguments in response to the petition. First, Global Link argues that the Commission has jurisdiction over the split delivery practice, and that the practice violates the Shipping Act, as section 41102(a) prohibits a shipper from obtaining, through any unjust or unfair device, a lower rate than would otherwise be applicable. Global Link states that falsely booking shipments to sham destinations and issuing false delivery orders constitute unjust and unfair devices, citing *Pacific Far East Lines – Alleged Rebates*, 11 F.M.C. 357, 364 (1968). According to Global Link, obtaining lower rates was the reason for the split delivery practice and for the concealment of the practice from the ocean carriers that were involved.

Global Link's second argument is that the petition seeks resolution of a problem that does not exist, i.e., the assertion by Petitioners that Global Link plans to use the voluntary disclosure proceeding to obtain from BOE an expert opinion for use in the arbitration. Global Link points out that BOE does not issue expert opinions, and a compromise agreement does not have precedential force.

Third, Global Link argues that the petition does not meet the standards for a declaratory order. Global Link notes that Rule 68 of the Commission's Rules provides that the procedures for seeking declaratory orders are to be invoked solely for the purpose of obtaining rulings which allow persons to act without peril upon their own view. 46 C.F.R. § 502.68. Global Link points out that as private equity funds, Petitioners are not subject to the regulatory jurisdiction of the Commission and, therefore, do not meet the requirements of Rule 68, as a declaratory ruling is unnecessary to allow them to act without peril upon their own view.

Fourth, Global Link argues that a rulemaking is not appropriate given the following circumstances: the petition lacks the required verification, a rulemaking is not appropriate to resolve a private dispute, and there is no need for a rule. Global Link states

that Petitioners have not identified a problem worthy of the expenditure of agency resources that would be required in a rulemaking, as the issue raised by Petitioners simply involves the interplay of statutory interpretation with a specific set of facts.

Finally, Global Link argues that there is no reason for public participation in Global Link's settlement negotiations. Global Link notes that the Commission has delegated to the Director of BOE authority to negotiate and enter into compromise agreements (46 C.F.R. § 502.604(g)), and the Commission may review the actions of BOE should a settlement take place. 46 C.F.R. § 501.21(f).

In its reply to the petition, BOE states that it has a pending investigation concerning Global Link, and has been collecting documents and information in order to fully ascertain the extent of potential violations of section 10(a)(1) of the 1984 Act. BOE states that it has had discussions about potential violations with counsel for Global Link, and has also had several discussions with counsel for Petitioners regarding the alleged split delivery practice. According to BOE, Petitioners are dissatisfied with BOE's evaluation of the issues, and are now attempting to invoke the Commission's formal processes to impede possible resolution of alleged violations pursuant to the Commission's informal compromise procedures. Therefore, BOE requests that the Commission deny the petition in its entirety.

BOE argues that Petitioners' request for a declaratory order and/or a rulemaking is untimely and inappropriate. BOE notes that Rule 68 of the Commission's rules is intended to provide guidance to persons who have not yet acted and who are seeking a legal ruling on a proposed future course of action. BOE points out that in this case, the activity which forms the basis of Petitioners' request for a declaratory order has already occurred, and Petitioners are not regulated by the Commission and are therefore not in a position to take a future course of action that would place them in peril.

BOE argues that Petitioners also fail to satisfy the procedural requirements for a rulemaking. BOE states that Rule 51 of the Commission's Rules provides that a petition for rulemaking must set out the nature of the relief sought; should include any facts, arguments and data deemed relevant by the petitioner; and should be verified. BOE states that Petitioners fail to provide any facts, data, or verification to justify the need for a rulemaking.

BOE asserts that the Commission is vested with jurisdiction to regulate through transportation, and Petitioners' argument that section 10(a)(1) of the Act does not include the inland portion of through transportation is contrary to legislative intent and regulatory purpose of the 1984 Act. BOE notes that in enacting the 1984 Act, Congress recognized that the intermodal movement of cargo was already a common form of ocean transportation service, and this recognition, together with Congressional intent that section 10 of the Act is intended to prohibit conduct that is considered harmful to ocean transportation, lead to the conclusion that the phrase "ocean transportation" in section 10(a)(1) bestows jurisdiction on the Commission to regulate both port-to-port and through transportation.

BOE states that Petitioners' attempt to transform BOE's informal investigation of Global Link's prior practice into a formal docketed proceeding is unjustified and inappropriate, in light of the fact that the Director of BOE has delegated authority to negotiate and conclude informal compromises on behalf of the Commission. 46 C.F.R. § 502.604(g). BOE notes that compromise agreements do not constitute legal precedent, and the compromise process is sufficient and appropriate for dealing with the issues involving Global Link, without the need for an adjudicatory proceeding.

In response to the Request for Comments from other parties, ABS Consulting (ABS) filed comments, and Petitioners filed a Response to Replies and Comments. In its comments, ABS states that the claimed practice of re-routing the domestic inland transportation leg of a through intermodal movement by NVOCCs

is “by no means a ‘common practice’ or legal under the Shipping Act of 1984...” ABS Comments at 1 (emphasis in original). ABS states that because some NVOCCs believe that they can deceive ocean carriers and purchase transportation at lower than published or contracted rates does not make their actions legal, and it unfairly distorts competition with other NVOCCs who do not participate in this deceptive scheme. ABS asks the Commission to find that the practice of re-routing described in this proceeding is not legal under current or past law.

Petitioners filed a Response to Replies and Comments, intended to address what Petitioners describe as certain errors made by Global Link, BOE and ABS. In their Response, Petitioners make several arguments. First, with regard to the practice of re-routing, Petitioners argue there is nothing in the Shipping Act, its legislative history, its amendments, Commission precedent, or Congressional oversight to suggest that the limited intermodal authority granted ocean common carriers and their conferences is an exclusive grant of authority intended to divest U.S. shippers of their rights to enter into their own arrangements with motor carriers. Second, Petitioners argue that their petition meets the procedural requirements for a declaratory order and/or rulemaking. Third, they argue that the meaning of “ocean transportation” is clear and unambiguous, and fourth, they argue that any interpretation of the term “ocean transportation” to include through transportation requires a public process. Finally, they argue that the compromise agreement will have the force and effect of law, and, therefore, interested parties must be permitted to participate in a notice and comment proceeding.

Petitioners subsequently filed a Motion to Accept Petitioners’ Previously Filed Response to Replies and Comments. In their Motion, they argue that there is good cause for the Commission to accept their previously filed Response for two reasons: 1) the Commission requested comments from interested persons other than Global Link and BOE, and Petitioners fall within the scope of the term “other interested persons;” and 2) their

Response provides new comment and information concerning the rulemaking aspects of this proceeding and other pertinent issues regarding the merits and certain procedural matters.

III. DISCUSSION

The Petition presents three alternative requests to be considered: 1) that the Commission issue a declaratory order clarifying that the practice of re-routing domestic inland points in an intermodal movement by NVOCCs does not violate the 1984 Act; 2) that the Commission initiate a rulemaking or other proceeding to consider these issues; or 3) that the Commission initiate a docketed proceeding and grant Petitioners and other interested parties leave to intervene in a formal investigation concerning Global Link's voluntary disclosure. In connection with these alternative requests for Commission action, Petitioners request that the Commission stay any informal proceedings before BOE, pending further action by the Commission hereunder.

A. Request that the Commission Issue a Declaratory Order

A petition requesting the issuance of a declaratory order is governed by Commission Rule 68. 46 C.F.R. § 502.68. Rule 68 provides that such petitions are to be filed "...solely for the purpose of obtaining declaratory rulings which will allow persons to act without peril upon their own view." 46 C.F.R. § 502.68(b). The Commission has said that Rule 68 is "...intended to provide guidance to persons who have not yet acted and who desire a legal ruling on a proposed, future course of action." *Petition of Evergreen Marine Corp. (Taiwan), Ltd. & Worldwide Logistics, Inc. for Declaratory Order*, 26 S.R.R. 605, 607 (FMC 1992). The Commission has also said that "[m]ost, if not all, petitions for declaratory order, by their very nature concern potential violations of law. In fact...a potential legal peril must be demonstrated before the Commission will, under its rules, even entertain a petition for declaratory order." *Independent Action on Freight Forwarder Compensation*, 23 S.R.R. 390, 395 (FMC 1985).

The Commission has denied a petition for a declaratory order when the activities upon which the petition was based have already occurred. *Rates Applicable to Ocean Shipment of AABCO, Inc. Filing of Petition for Declaratory Order*, 22 S.R.R. 762, 763 (FMC 1984). Specifically with regard to informal investigations conducted by BOE, the Commission has said that such investigations "...are not a basis for claiming that the regulated entity is acting with peril and is entitled to a declaratory order." *Impact of Modern Technology on Freight Forwarding Industry*, 28 S.R.R. 418, 425 (FMC 1998).

The quoted language from the Commission's order in *Impact of Modern Technology on Freight Forwarding Industry* highlights one of the deficiencies in Petitioners' request for a declaratory order: Petitioners are private equity funds that are not subject to the Commission's jurisdiction, are not entities regulated by the Commission, and are not in a position to take action that places them in peril insofar as the Commission is concerned. In addition, Petitioners are not seeking a legal ruling on a proposed future course of action, as contemplated in Rule 68, as the activities at issue have already occurred. Taking these factors into consideration, it appears that Petitioners' request for a declaratory order does not meet the requirements of Rule 68 that such request is to be filed "solely" for the purpose of allowing Petitioners to act without peril upon their own view. As the request does not meet the requirements of Rule 68, there is no basis for granting it.

B. Request that the Commission Initiate a Rulemaking Proceeding

Petitions requesting the initiation of a rulemaking are governed by Rule 51 of the Commission's Rules. 46 C.F.R. § 502.51(a). Rule 51 provides that a petition for the issuance of a rule "...shall set forth the interest of petitioner and the nature of the relief desired, shall include any facts, views, arguments, and data deemed relevant by petitioner, and shall be verified." 46 C.F.R. § 502.51(a). The Commission has explained the rationale for this

requirement by stating that such petitions "...are to be accompanied by supporting facts and data, so as to convince the Commission of the need for broad regulatory relief." *Marine Terminal Tariff Provisions Regarding Liability of Vessel Agents*, 27 S.R.R. 611, 614 (FMC 1996). In that case, the Commission concluded that the petition for rulemaking should be denied as it was "...accompanied by no such factual information, either in terms of illustrations of isolated instances, or, as would support a petition for relief on a nationwide scale, evidence of pervasive conditions requiring a rule of broad applicability." *Id.*

The Commission has likewise denied petitions for rulemaking which failed to present "...an adequate factual basis justifying Commission rulemaking." *Agriculture Ocean Transportation Coalition – Terminal Handling Charge*, 25 S.R.R. 1404, 1405 (FMC 1991), or which fail to adequately demonstrate need or urgency: "...we find little need or urgency supporting the initiation of a rulemaking on this issue." *Impact of Modern Technology on Freight Forwarding Industry*, 28 S.R.R. at 424. The Commission has also denied a petition for rulemaking when it was not "...supported by any of the responding comments," noting that the lack of support indicated "...that, contrary to the Petition's urging, there is no industry-wide confusion" on the issue involved. *Id.* In addition, the Commission has denied a petition for rulemaking in a situation where no specific rule was proposed by the petitioner, and the Commission was instead urged to "...use a rulemaking proceeding as the mechanism for declaring unlawful certain tariff provisions." *Marine Terminal Tariff Provisions Regarding Liability of Vessel Agents*, 27 S.R.R. at 614.

In this case, Petitioners have failed to set forth supporting facts and data that show convincing need for the broad regulatory relief envisioned in a rulemaking proceeding. Petitioners have shown neither that the "split delivery" practice previously engaged in by Global Link is common among NVOCCs, nor that there is industry-wide confusion regarding the legality of this practice. As indicated in the comments filed by ABS Consulting, the only party

to file comments in response to the petition, the practice described in the petition is not common practice among NVOCCs. ABS also asserts that the practice described by Petitioners deceives ocean carriers and distorts competition with other NVOCCs, and is illegal under the Shipping Act. While Petitioners dispute these claims, it is not the burden of ABS Consulting to either demonstrate or disprove the existence of such common industry practice. That burden rests with the Petitioners. 46 C.F.R. § 502.155.

A rulemaking is an inappropriate proceeding to resolve a private dispute or enforcement matter. See Comments in *Impact of Modern Technology on Freight Forwarding Industry*, 28 S.R.R. at 421. Furthermore, as entities that are not subject to the Commission's jurisdiction, Petitioners would have no stake in any rule that might be adopted prospectively by the Commission.² Finally, the request for rulemaking is procedurally deficient as it is not verified, as required by Rule 51. As Petitioners' request for rulemaking does not appear to meet the requirements of Rule 51, there is no basis for granting it.

C. Request that the Commission Initiate a Formal Proceeding, Grant Petitioners Leave to Intervene, and Stay Informal Proceedings Before BOE

Petitioners argue that Global Link's voluntary disclosure is premised upon a novel and untested interpretation of the Shipping Act and should, therefore, be the subject of a formal docketed proceeding. Petitioners state that based on the adversarial relationship between Global Link and Petitioners, and the fact that Global Link "stands to gain financial benefit" from the adoption of this novel interpretation of the Act, a formal penalty assessment proceeding under Rule 603 must be instituted. Petitioners state that the Commission has the authority to institute a formal assessment

² Insofar as any Commission rule could have only prospective effect, it is not clear that Petitioners' request for rulemaking would meet Petitioners' desire for a binding statement of policy as to a practice already terminated by Global Link.

proceeding at any time after the initiation of informal compromise procedures, citing 46 C.F.R. §§ 502.61(a) and 502.603(c). Petitioners argue that informal proceedings by BOE should not be used to deprive them of their “intervention rights” under the Commission’s rules. Petitioners state that they have a significant and substantial interest in the proceeding because the challenged conduct occurred while Petitioners owned Global Link, and Global Link’s intent to use the voluntary disclosure proceeding in the commercial arbitration demonstrates that the outcome of the proceeding will have a material effect on Petitioners’ interests.

The Commission has delegated to BOE the authority to compromise civil penalties. 46 C.F.R. § 502.604(g). Through use of this authority, “...BOE attempts to avoid having to engage in formal docketed proceedings by making full use of the Commission’s ‘compromise’ authority, i.e., the authority to settle cases with respondents suspected of violating the Act by obtaining agreement to make payments in lieu of formal civil penalties that could be ordered at the conclusion of formal docketed proceedings.” *Refrigerated Container Carriers Pty. Ltd. – Possible Violations of 1984 Act*, 28 S.R.R. 799, 805 (ALJ 1999).

The Commission encourages informal resolution of cases through compromise or settlement. In its Alternative Dispute Resolution Policy Statement, the Commission noted the usefulness of compromise negotiations to achieve faster and less expensive results than would be achieved with formal adjudications: “As an alternative to formal adjudications, the Commission’s Bureau of [Enforcement]...is authorized to conduct compromise negotiations, which may result in an agreement for the payment of a civil penalty without admission of violations of law. 46 CFR §§ 502.601-502.605. This form of dispute resolution has been widely used at the Commission and has successfully resulted in the avoidance of many possible protracted formal adjudications.” *Alternative Dispute Resolution Policy Statement, Docket No. 93-07*, SR Current Service ¶ 530:51, SR Page 530:207, 210 (FMC 1993).

Compromise agreements typically include a provision that the agreement is not to be construed as an admission of alleged violations of the Shipping Act. An example of a compromise agreement set out in the Commission's Rules contains the following provision: "It is expressly understood and agreed that this Agreement is not, and is not to be construed as, an admission by Respondent to the alleged violations set forth above." *Appendix A to Subpart W of Part 502 – Example of Compromise Agreement to be Used Under 46 CFR 502.604*. Because respondents in compromise agreements do not admit to violations of the Act, there is no finding of violation by the Commission. As pointed out by BOE, a compromise agreement between the Commission and Global Link would resolve the dispute with respect to the alleged violations, but would not constitute Commission legal precedent.

In addition to Commission policy favoring the use of informal dispute resolution where appropriate, Petitioners have not included in their petition information or evidence which would justify the institution of a formal investigation by the Commission, or merit inclusion of Petitioners therein. See *East Coast Colombia Conference and Agropecuaria y Maritima Santa Rosa Ltda. – Petition for Investigation (Agromar)*, 22 S.R.R. 723, 725 (FMC 1984). In *Agromar*, the Commission concluded that use of informal compromise procedures, rather than a formal investigation, was appropriate since "...Agromar has expressed a willingness to cooperate with the Commission and provide relevant documents and information on the possible violations at issue..." *Id.* As in the current case, the complaining party in *Agromar* requested that it be made a party to the formal proceeding that was sought in the petition for investigation. The Commission noted that this request raised an issue of significant procedural importance, and concluded that neither the Shipping Act "...nor its legislative history evidences a Congressional intent to subordinate the Commission's discretionary powers to settle or compromise penalties to interference by other parties." *Agromar*, 22 S.R.R. at 726.

⁴ In *Agromar*, the Commission examined judicial precedent with regard to "...the right of third parties to a hearing in the compromise and settlement of civil penalties," and concluded that court decisions indicated that "...unless the statute provides for a private cause of action, the participation of affected parties other than the respondent in the decision making process with respect to the prosecution of violations or assessment of penalties would infringe upon the agency's exercise of its discretionary powers." *Id.* Therefore, the Commission concluded that it would be "...inappropriate for the Commission to permit the Conference or any other third person to become a party to a formal assessment proceeding of the type sought by the Petition here. For the same reasons, the conference's participation in the informal procedure contemplated by the order [informal compromise procedure] will be limited to the submission to Hearing Counsel of any evidence of information that it may possess bearing on the fact of the alleged violations." *Id.* (emphasis in original).

Based on precedent adopted by the Commission in *Agromar*, a third party will not be allowed to intervene in informal compromise procedures but has the option to submit to BOE information or evidence relating to the allegations at issue. In this case, Petitioners have already submitted information to BOE. Therefore, it would appear that they have had the opportunity to participate in the informal compromise process in progress between BOE and Global Link, to the extent appropriate.

As noted by Global Link, "[p]ermitting third parties to intervene in compromise negotiations would wreak havoc on the process and virtually guarantee that such negotiations would never succeed, to the detriment of both the Commission and the public." Global Link Reply at 15. Moreover, actions taken by BOE in connection with compromise agreements may be reviewed by the Commission at any time. 46 C.F.R. § 501.21(f). Based on the fact that Commission policy encourages informal procedures as an alternative to more costly and lengthy formal proceedings, and the fact that Petitioners have not included in their petition information

or evidence that would justify the initiation of a formal proceeding in lieu of informal compromise procedures, there is no basis for the initiation of a formal proceeding.³

D. Procedural Matters

Petitioners have filed a Motion to Accept Petitioners' Previously Filed Response to Replies and Comments. Rule 74(a)(1) of the Commission's Rules prohibits replies to replies, and the Commission has consistently denied requests to file replies to replies. See *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, 31 S.R.R. 623, 627 (FMC 2009), and *Exclusive Tug Franchises – MTOs Serving the Lower Mississippi River*, 30 S.R.R. 278, 282 (FMC 2004).

Petitioners argue that their Response to Replies and Comments should be accepted because Petitioners fall within the definition of "other interested persons" from whom comments were sought, and because their Response provides "new information" concerning the rulemaking aspects of this proceeding. Petitioners' arguments urging that their Response be accepted are not persuasive. In the Commission's February 19, 2009, Request for Comments, it was stated that "[i]n order for the Commission to make a thorough evaluation of the Petition, other interested persons are hereby invited to submit views or arguments in reply to the Petition..." Request for Comments at 1. Petitioners cannot reply to their own petition and clearly do not fall within the category of "other interested persons" envisioned in the Request for Comments. Contrary to the purpose of the Request for Comments, Petitioners have sought to generate a further opportunity to present arguments in support of their petition, a result prohibited under Rule 74(a)(1).

³ As Petitioners' alternative requests for issuance of a declaratory order, initiation of a rulemaking proceeding, or initiation of a formal docketed proceeding are being denied, there is no basis for granting their request to stay the informal proceeding before BOE. Therefore, that request is also denied. The Commission has delegated authority to BOE to engage in the informal compromise process, and can review action taken by BOE if it so determines.

While the Commission may waive the application of Rule 74(a)(1) in order to “prevent undue hardship, manifest injustice, or if the expeditious conduct of business so requires” (46 C.F.R. § 502.10), Petitioners here have made no showing of hardship or injustice, and acceptance of their Response would not further the expeditious conduct of Commission business. Like the complainants in *Western Overseas Trade and Development Corp. v. ANERA*, 26 S.R.R. 874 (FMC 1993), Petitioners in this case have presented no cogent reason why Rule 74(a)(1) should be waived. *Id.* at 876 n.5. Instead, Petitioners attempt only to rebut the comments of ABS, as well as the arguments of BOE and Global Link. In a similar situation, the Commission denied a request to file a reply to a reply, when petitioners merely sought “an opportunity to rebut the arguments in ...[a] Reply in Opposition to their Petition.” *Carolina Marine Handling, Inc. v. South Carolina State Ports Authority*, 30 S.R.R. 1243, 1245 (FMC 2006). Pursuant to Rule 74(a)(1) and Commission precedent, Petitioners’ Motion will be denied and its Response to Replies and Comments will not be accepted into the record.

Based on the fact that we are denying Petitioners’ Motion, Global Link’s Motion to Strike Petitioners’ Response is dismissed as moot. However, Section II of the Motion to Strike contains a reply to Petitioners’ Response, which constitutes a reply to a reply. Pursuant to Rule 74, this Section will also not be accepted into the record. Finally, as Global Link’s Motion to Strike is moot, Petitioners’ Reply to Motion to Strike is likewise dismissed as moot.

THEREFORE, IT IS ORDERED, That the Petition of Olympus Growth Fund III, L.P. and Olympus Executive Fund, L.P. for Declaratory Order, Rulemaking or Other Relief is denied;

IT IS FURTHER ORDERED, That Petitioners’ Motion to Accept Petitioners’ Previously Filed Response to Replies and Comments is denied and Petitioners’ Response to Replies and Comments is not accepted into the record;

IT IS FURTHER ORDERED, That Section II of Global Link's Motion to Strike is not accepted into the record;

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

A handwritten signature in cursive script, reading "Karen V. Gregory".

Karen V. Gregory
Secretary